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Supreme Court, U.S.
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No. 98-1675

IN THE

Supreme Court of the United States

MICHAEL PANAYOTIDES,

Petitioner,

v.

JULIE PANAYOTIDES,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

Respondent incorporates herein by reference Petitioner's Appendices, which accurately reflect the Orders of the Court of Common Pleas of Berks County, Pennsylvania, the Superior Court of Pennsylvania, and the Supreme Court of Pennsylvania.

STATEMENT OF OBJECTION TO JURISDICTION

A. Jurisdiction pursuant to 28 U.S.C. § 1257 (State Courts; Certiorari)

Respondent challenges whether the instant Petition may be accepted for issuance of a Writ of Certiorari under 28 U.S.C. § 1257, where no state statute or treaty is drawn in question as contrary to the United States Constitution, Treaties or Laws of the United States. Respondent similarly challenges whether Petitioner has alleged any cognizable title, right, privilege or immunity under the Constitution, Treaties or Statutes of the United States.

Petitioner's reliance upon this Court's decision in *Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988) and *Hilton v. Guyot*, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95, 108 (1895) is misplaced and insufficient to support the jurisdiction of this Court. The Thompson decision is utilized for its dicta where Justice Scalia, in rejecting the claim of whether the Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A created an implied federal cause of action, noted that the Supreme Court remains available to resolve "truly intractable jurisdiction deadlocks." 484 U.S. at 520, 108 S. Ct. at 187. As is more fully set forth in the opinions below and the response herein, no such deadlock exists other than that unilaterally created by Petitioner in continuing to litigate in the United States his opposition to resolving his child custody

dispute under Australian law as was previously required by the State Courts here in the United States, the Hague Court sitting in Australia, and most recently, the Family Court of Australia.[1]

B. Violation of Rule 10 of the Rules of the Supreme Court of the United States (consideration governing review on certiorari)

Petitioner's request for Writ of Certiorari fails to establish any compelling reason for issuance of the Writ, and fails to establish that a State Court of last resort has decided an important federal question in a way that conflicts with the decision of another State Court of last resort or of a United States Court of Appeals and further consists entirely of asserted erroneous factual findings and/or misapplications of properly stated rules of law in the Courts below. Thus, the Petition violates the mandate of Rule 10 of the Rules of the Supreme Court of the United States.

C. Waiver Consistent with Rule 15 of the United States Supreme Court

Respondent asserts that Petitioner waived several of its arguments by failing to either raise or argue same before the Pennsylvania appellate courts. It is well settled that contentions not mentioned before the lower courts and not developed with

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1. By Order dated April 1, 1999, the family Court of Australia retained jurisdiction over the parties' underlying child custody action, overruling Petitioner's objections to jurisdiction. A true and correct copy of the Family Court Order is set forth at Appendix A of this Response. Paragraph 4 of the Family Court Order, which refers to "application for residence and contact" is the Australian equivalent of a child custody petition. Petitioner's statement at footnote 2 of his petition, that as of the date of filing the Petition, the Australian courts had not yet ruled on his Objections to Jurisdiction is false. Although not part of the record below, given its recency, the April 1, 1999 Order of the Family Court of Australia is entitled to jurisdictional notice.

any fullness before the Supreme Court on direct appeal are considered abandoned. *United States v. Philadelphia National Bank*, 374 U.S. 321, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (U.S. Pa. 1963). Issues raised but not briefed are waived for the purposes of appellate review. Assignment of error not supported by argument by appellant's brief or at bar is deemed abandoned. *Harman v. Chambers*, 57 A.2d 842 (Pa. 1948). *Commonwealth of Pennsylvania Department of Transportation v. Kosa*, 639 A.2d 1252 (Pa. Cmwlth. 1994).

1. *Waiver of PKPA Argument*

Petitioner, in its attempt to create a so called "jurisdictional deadlock," argues that the State Courts committed an egregious error in violation of his constitutional rights by failing to analyze or apply the provisions of the Parental Kidnaping Prevention Act 28 U.S.C. § 1738A ("PKPA") when reviewing the evidence relating to jurisdiction. Although the PKPA does not apply, for reasons more fully stated herein, this argument was not raised before the trial court. Rather, Petitioner first asserted such an argument, not in his direct appeal to the Pennsylvania Superior Court, but rather in a later filed reply brief in front of the Pennsylvania Superior Court. The Pennsylvania Superior Court, in its memorandum opinion dismissed all four of Petitioner's issues raised on its direct appeal, by disposing of the appeal on a substantive issue relating to the propriety of the trial court's decision in declining jurisdiction. Accordingly, the PKPA argument was never raised before the trial court, was deemed waived for failing to raise it on a direct appeal to the Superior Court, and is deemed abandoned under the aforementioned case law.

2. *Due Process Claim Waived*

Petitioner asserts that his Constitutional Due Process rights were violated by the State Courts in Pennsylvania when the trial court scheduled, but later canceled an evidentiary hearing

on the underlying custody jurisdiction challenge. The argument was raised in a brief before the Pennsylvania Superior Court and dismissed. The argument was listed as an issue in Petitioner's Petition for Allowance of Appeal to the Pennsylvania Supreme Court, however, Petitioner failed to carry through any argument supporting the claim in its Petition. Accordingly, that issue was not before the Pennsylvania Supreme Court and is therefore deemed waived and abandoned for the purposes of this Petition.

3. *Jurisdictional Claim is Waived*

Petitioner asserts the trial court erred in finding that the Respondent did not submit to the Pennsylvania courts' jurisdiction when she sought enforcement of the initial Australian Child Custody Order. Similarly, that claim was raised on direct appeal to the Pennsylvania Superior Court, briefed, and dismissed. It was identified as an issue in Petitioner's Petition for Allowance of Appeal to the Pennsylvania Supreme Court, but not carried forward in the Petition itself. It is thus deemed abandoned for the purposes of the within Petition.

4. *Comity Argument Waived*

Petitioner claims the State trial court erred in granting full faith and credit to the original Australian Custody Order without holding a hearing to enable Petitioner to test the validity of the foreign Order. This contention has never been raised at the trial court level, the Pennsylvania Superior level, or in Petitioner's Petition for Allowance of Appeal to Pennsylvania Supreme Court. It is therefore deemed waived and abandoned for the purposes of the instant Petition.

Notwithstanding the obvious waivers of Petitioner's claims, the record reflects that the arguments are meritless for reasons for fully set forth in the opinions below and the response herein.

STATUTES INVOLVED

Pennsylvania Uniform Child Custody Jurisdiction Act ("Pa. UCCJA"), 23 Pa. C.S.A. § 5341, *et seq.*; Hague International Child Abduction Convention, S. TREATY DOC. No. 11, 99th Cong., 1st Sess.; International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601, *et seq.*; Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A(b)(8).

COUNTERSTATEMENT OF THE CASE

Due to the intentional omissions from Petitioner's Petition, respondent submits the following counter statement of the case. The Pennsylvania Superior Court Panel, in its memorandum opinion filed July 30, 1998, adopted the findings of fact of the trial court, which follow:

> This case is before the court on plaintiff's Petition for Special Relief Pursuant to Pa. R.C.P. 1915.13. The following are the pertinent uncontroverted facts gleaned from the record and procedural history.
>
> > Plaintiff, Michael Panayotides, and defendant, Julie Panayotides, are husband and wife. Plaintiff (hereinafter, Husband) was born in Greece and became a naturalized United States citizen. Defendant (hereinafter, Wife) was born in Australia. The parties married in November, 1978. Throughout their marriage they have lived in the United States; Wife, however, never obtained United States citizenship status. Their child, Luke, was born in Pennsylvania on November 25, 1991.
> >
> > For a long time during the marriage Wife desired to return to Australia to live

and she became more impatient to do so after Luke's birth. In 1995 the parties decided to travel to Australia to explore opportunities to live there. Husband was reluctant to do so but he agreed to go to Australia to start a new life in order to save his family. The parties agreed that before they would establish residence in Australia certain conditions had to be met. Their concerns were primarily financial. The parties disagree as to whether the conditions were satisfied. Wife claims that they were, Husband insists that they were not.

In preparation for relocating to Australia Husband applied to the Department of Immigration for permanent residence. In his application Husband asserted, "Luke is an Australian citizen. He will be relocating to Australia with my wife and myself," and "My spouse is an Australian citizen who is relocating to Australia with me."

Husband was unemployed in 1995. He went alone to Australia in June, 1995, to explore employment opportunities. Wife arrived with Luke in Australia approximately two weeks later. Although Husband was unable to secure employment, Wife quickly found a good job. She then resigned from her job in Pennsylvania.

Both parties applied for resident drivers' licenses and tax numbers in Australia.

The parties listed the marital residence in Pennsylvania for sale. They enrolled Luke in a preschool even though Husband was unemployed. They also enrolled Luke in the attached school for the 1996 school year.

Husband returned to the United States to check on the parties' properties in August, 1995. While Husband was in Pennsylvania he sent Wife $20,000.00 from their joint savings account.

In October, 1995, Husband again returned to Pennsylvania. At that time he made arrangements to ship the parties' property, including furniture, to Australia.

In Australia Wife processed and secured a housing loan in joint names with a bank for the purpose of acquiring a home. Husband contacted several financial institutions to inquire about the term of housing loans. In November, 1995, the parties signed a lease of six months for a rental property.

Immediately after moving into the rental property the parties had a serious argument. Wife refused to return to the United States and Husband wanted her to do so. On the day following the argument Husband took Wife, as he usually did, to the train station for her to take a train to work. He then took the child with him to the airport and without Wife's knowledge or consent took the child to visit relatives

in Greece. On December 29, 1995, after spending approximately one month in Greece, Husband returned with the child to the former marital residence in Pennsylvania.

Wife filed for custody of Luke on December 28, 1995, in Australia. On January 3, 1996, the Australian court granted her Petition for Interim and Final Custody.

On January 3, 1996, (January 4, 1996, in Australia) Husband filed for custody in Berks County.

On that same day in Berks County, Wife was granted an ex parte Temporary Custody Order on the basis of the Australian Order. A hearing was set for January 10, 1996. Due to a blizzard the hearing was continued; however, on January 9, 1996, Wife returned to Australia with Luke.

On January 16, 1996, Wife withdrew her petition for temporary custody in Berks County.

Wife filed preliminary objections to jurisdiction of this court. By Order of February 7, 1996, the court stayed further proceedings and provided for the creation of a record by deposition prior to rendering a decision on jurisdiction. The depositions have never been completed.

> On March, 1996, in Australia Husband filed an application under the Hague Convention for the return of Luke to Pennsylvania. On June 6, 1996, the Australian court found that Australia was Luke's habitual residence because the parties had relocated to Australia with the intent to reside there permanently. The court therefore denied Husband's application because the child was not wrongfully removed from the United States.
>
> Husband appealed the decision. The appeal was dismissed on December 6, 1996. Husband then filed an appeal to the High Court of Australia.
>
> On January 30, 1997, Husband filed a Petition for Special Relief which was denied by this court on March 18, 1997.
>
> On February 14, 1997, Husband filed this instant petition. Argument was held on April 23, 1997. The pleadings were closed on June 6, 1997.

Petitioner Appendix (2A-5A).

By Order dated September 16, 1997, the trial court, after considering the pleadings, briefs, record and argument, dismissed Husband's Petition for Special Relief and relinquished jurisdiction and dismissed Husband's Complaint for Custody. On Appeal to the Superior Court, Petitioner alleged the aforementioned issues as set forth in its Petition for Allowance of Appeal. Following the submission of briefs and oral argument thereon, by Memorandum Opinion dated July

30, 1998, the Superior Court Panel affirmed the trial court Order. In the Superior Court's Memorandum Opinion, the Panel succinctly dismissed Petitioner's first three issues raised on appeal and squarely addressed the issue of whether the trial court correctly declined to assume jurisdiction over the Petitioner's Pennsylvania custody action. Husband's Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania by Order dated January 14, 1999. Petitioner timely filed the within Petition for Writ of Certiorari from that Order.

REASONS FOR DENYING THE WRIT

I. APPLICATION OF THE PKPA

Petitioner asserts that the trial court and appellate courts in Pennsylvania erred by failing to apply the PKPA in determining whether jurisdiction was proper in Pennsylvania for the underlying custody matter. Petitioner suggests that this purported error raises important substantial questions of Federal law not previously addressed. Petitioner is correct in so far as the matter has not been previously addressed, because the PKPA does not apply to child custody actions involving *international* child abduction. The PKPA is a federal law enacted to address *interstate* child abductions within the United States. As this Court in *Thompson* noted, the principle aim of this statute was to the extend the requirements of the full faith and credit clause to custody determinations entered by a sister state court. 44 U.S. at 175, 108 S. Ct. at 514. The purpose of the law is to "avoid jurisdictional competition and conflicts between state courts. *Id.* at 177, 108 S. Ct. at 515. Under the PKPA, a "state" is defined as any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory possession of the United States. 28 U.S.C. § 1738(b)(8). Petitioner apparently confused "states" under that Federal law with the concept of "contracting states" under the Hague Convention. A "contracting state" under the Hague Convention is any sovereign nation which signs the treaty. The United States

and Australia are signatory contracting states to the Hague Convention. Hague Conference on Private International Law, Cir. No. (94) January 21, 1994.

The PKPA is a directive to State Courts to acknowledge the validity of child custody decrees of other states. The law does not apply to the fact of this case for several reasons. In this case, the trial court declined to exercise jurisdiction of Petitioner's child custody action filed in Pennsylvania Court for reasons stated under the UCCJA and in light of the pendency of the preexisting child custody action first filed by Respondent in Australia. The State Superior Court panel correctly held that once the trial court was satisfied that the Hague Court properly determined jurisdiction of the underlying custody action in Australia consistent with the mandate of the UCCJA, the trial court was required to decline jurisdiction. Moreover, the Superior Court panel concluded that the evidentiary record before the trial court supported trial court's determination that Australia was the home nation of the child for the purposes of continuing the child custody jurisdiction. Moreover, the PKPA does not confer jurisdiction to litigate child custody actions and indeed does not apply where a State Court determines that it does not have jurisdiction over the child and refuses to exercise jurisdiction. Declining the exercise jurisdiction does not constitute a "determination of child custody" within the meaning of the PKPA. *Anderson v. Anderson*, 449 N.W.2d 799, 801, n.2 (ND 1989).

II. THE HAGUE CONVENTION PROCEEDINGS

Petitioner's second argument asserts that the jurisdictional factors and criteria predicated by the PKPA where neither addressed nor met during the Hague Convention proceedings and asserts that Hague proceedings and the trial court decision in the Pennsylvania custody action renders the PKPA, the ICARA and the Hague Convention "inoperable."

Petitioner not only shamelessly misinterprets the Hague Convention proceedings, but more importantly has ignored the evidentiary record in this matter and has grossly distorted the trial court's findings and conclusions.

The Hague International Child Abduction Convention is an international treaty which offers the opportunity for the international community to deter and to remedy the wrongful taking of children across transnational boundaries. The Hague Convention is implemented in the United States by the International Child Abduction Remedies Act ("ICARA") 42 U.S.C. § 11601, *et seq.* Article I of the Convention states that "the objects of the Conventions are:

> (1) To secure the prompt return of children wrongfully removed to or retained in any contracting state; and
>
> (2) To ensure that the rights of custody and of access under the law of contracting state are effectively respected in the other contracting states."

The Convention remedy is simple, the child is ordered returned to the country of their habitual residence for the resolution of any custody dispute. The Convention does not offer a uniform international standard for determining substantive custody rights, nor does it provide for the enforcement of custody decrees rendered by another foreign state. That recognition must come from each state's substantive law.

The fundamental premise of the Convention is that the country in which the child is "habitually resident" should be the decisionmaker in any custody dispute, because the state of habitual residence has the most significant interest in resolving the dispute and will usually be best situated with information to determine the ultimate merits of any custody controversy.

Under Article III of the Convention, removal or retention of a child is considered "wrongful" where:

> (a) It is in breach of rights of custody attributed to a person . . . under the law of the state in which the child was habitually resident immediately before the removal or retention; and
>
> (b) At the time of removal or retention, those rights were actually exercised . . . or would have been so exercised but for the removal or retention.

Hague Convention, Article III.

The ICARA is the law that implements the Convention in the United States. Pursuant to the ICARA, state and federal courts are statutorily required to give full faith and credit to "the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention . . ." 42 U.S.C. § 11603(g).

The Hague Convention sets the jurisdiction for the substantive resolution of the underlying child custody dispute. In order to respond to a wrongful removal application, the court in the state where the Hague Convention application is being heard ("Hague Court") must make a threshold determination as to the factual issue of the child's habitual residence immediately prior to the removal and/or retention. *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3rd Cir. 1995). The Hague Convention does not define the term "habitual residence", but rather the determination of which state is the habitual residence is a critical factual determination of the jurisdiction where the ultimate merits of the custody fight are to be decided. *See* Elisa Perez-Vera, *Explanatory Report ACTS AND DOCUMENTS OF THE 14TH SESSION OF THE HAGUE CONFERENCE ON*

PRIVATE INTERNATIONAL LAW, 426 at 430 (hereinafter "Perez-Vera Report").[2]

In this matter, Respondent filed for custody in Australia on or about December 28, 1995. Respondent was awarded temporary custody by Australian Family Court Order dated January 2, 1996. The next day in the United States, in the Court of Common Pleas of Berks County, Petitioner filed his custody complaint, while simultaneously Respondent petitioned Berks County Court to enforce the Australian Custody Order. Respondent was awarded temporary custody pending further hearing of the Court. Notwithstanding the fact that both the Australian Court and the Pennsylvania Court had awarded Respondent custody of the parties' child, Petitioner initiated a Hague Application alleging that the child was wrongfully removed from Pennsylvania.

Petitioner's Hague Application was heard by the designated Hague Court, the Family Court of Australia, and that court reviewed the submission of volumes of documentary evidence, sworn statements and affidavits. Pursuant to its implementing regulations, the Hague Court "must refuse an order for return if . . . the child is not habitual resident of the Convention country immediately before removal." A party seeking return under the Hague Convention must prove by a preponderance of the evidence that the child was "wrongfully removed." *Feder v. Evans-Feder*, *supra* at 222. The Family Court dismissed Petitioner's Hague Application by Judgment dated May 31, 1996, and supported by Reasons for Judgment dated June 6, 1996.

In its Reasons for Judgment, the Family Court found as a fact that the parties had,

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2. Elisa Perez-Vera was the official Hague Conference Reporter. Her explanatory report is recognized as the official history and commentary on the Convention. Public Notice 957, 51 Fed. Reg. at 10503.

> subsequent to their arrival in Australia in the Summer of 1995, formed a settled intention to reside in Australia for an indefinite period of time, and to live in this country as a family . . . I find that the circumstances were such that by July or August of 1995 [sic], they had reached a common decision to put that into effect.

(Family Court Reasons for Judgment, Paragraph 51.)

The Family Court further found that

> as a result of the parties' decisions and actions, there had been a change in the habitual residence of the parties and their child from the United States of America to Australia. "*I find that the husband, being unable to unilaterally determine a child's habitual residence, wrongfully removed the child from Australia on 21 November without the wife's knowledge and consent.*"

(Family Court Reasons for Judgment, Paragraph 52.)

Ultimately, the Family Court found that the Australian Central Authority[3] failed to satisfy its burden of proof in the first instance that the child was habitually a resident of the United States of America at the relevant time and, secondly, failed to prove that Respondent's removal of the parties' child on January 9, 1996, was "wrongful" within the meaning of the Act. The Family Court, although not required to do so, reviewed the UCCJA on the issue of jurisdiction and specifically determined that § 5344 vested the Hague Court with jurisdiction over the "habitual residence" issue.

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3. Under the Hague Convention, the Australian Central Authority appeared on Petitioner's behalf in addition to Petitioner's private counsel at the family court level. The Australian Central Authority did not elect to appeal, and Petitioner pursued all further appeals on his own right.

Thereafter, Petitioner appealed to the Full Court of Australia ("Full Court"), the highest family court in Australia, and challenged the weight and sufficiency of the Family Court's determination of "habitual residence". The Full Court exercised broad discretion in examining all evidence, including "fresh evidence" produced by Petitioner which was not introduced at the Family Court level. Petitioner's submission to the Full Court included an Affidavit from Petitioner's Counsel, Rodney Fisher, Esquire, on the application of Pennsylvania state law to an Article III "Wrongful Removal" claim. In a thorough and cogent decision, the Full Court upheld the Family Court's findings and dismissed Plaintiff's Appeal. Thereafter, Petitioner sought leave to appeal to the High Court of Australia, the equivalent of our United States Supreme Court, which request was denied.

In this matter, the trial court found that the evidence of record was sufficient under the UCCJA for it to conclude that the Family Court in Australia correctly determined that Australia was in fact the child's place of "habitual residence" under the Hague Convention for the purposes of establishing jurisdiction of the parties' substantive custody dispute. (T.Ct.Op. at p. 6). The trial court expressly found that Respondent's removal of the child from the United States to Australia was not "wrongful" under the UCCJA (relating to home state jurisdiction). The trial court thus concluded that Pennsylvania was not the "home state" of the child under the jurisdictional provisions of the UCCJA. (T.Ct.Op. at p. 6).

The court went on to explain that even if it were to determine that Pennsylvania was the "home state" of the child, the court would decline to exercise its jurisdiction on the record. The trial court found that Australia met the "significant contacts" test of the UCCJA for the purposes of establishing jurisdiction, and expressly found: "that Australia is the more appropriate forum due to the child's significant connections to Australia. The court will not exercise jurisdiction simply because Pennsylvania has been the child's home state prior to relocating

to Australia." (T.Ct.Op. at pp. 7-8). The trial court properly agreed with the Hague Court's determination, which set the jurisdiction of the substantive custody dispute.

Petitioner, not satisfied with the jurisdictional results of the Hague proceedings he himself initiated, sought through the Pennsylvania action to have a Pennsylvania Court undo the Hague Court's efforts under the Hague treaty.

It is well-settled that trial court's decision to decline jurisdiction in a matter arising under the UCCJA will not be overturned absent an abuse of discretion. *Hamm v. Hamm*, 636 A.2d 652 (Pa. Super 1994). In this case, a valid determination of jurisdiction of the parties' substantive custody dispute has already been made by a Contracting State to the Hague Convention. Article I(b) of the Hague Convention demands deference to the Hague Court's determination of habitual residence and therefore the locus for adjudication of the custody rights of the respective parties. In *Feder v. Evans-Feder*, 63 F.3d 217 at 221, our Third Circuit Court of Appeals cited the Perez-Vera Report to the Hague Convention which explained that the internal law of a child's habitual residence applies to determine the substantive custody rights of the litigants. (Perez-Vera Report at 445-446. *See also* Linda Silberman, *HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION: A BRIEF OVERVIEW AND CASE LAW ANALYSIS*, 28 Fam.L.Q. 9, 31 Spring 1994. (Article I(b) of Convention mandates that Contracting States defer to custody laws of the state of habitual residence to determine whether custody rights have been infringed.)

Moreover, the ICARA requires that the court in the country of habitual residence must make the substantive decisions on custody. *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996) (citing 42 U.S.C.A. § 11603). Accordingly, on this basis alone, the trial court was statutorily obligated to give full faith and credit to the Hague Court's determination of jurisdiction. Petitioner's argument must fail on this basis alone.

Remarkably, Petitioner now asserts that the Hague Convention matter in Australia, which included a voluminous record of evidence and the exhaustion of appeals to the highest court in Australia, did not concern jurisdiction of the custody action; Petitioner's argument not only completely ignores the purpose of the Hague Convention, but his construction of the UCCJA is at odds with his own argument.

The UCCJA was intended to avoid jurisdictional competition and conflict with courts of various states in matters of child custody. Our legislature intended to promote cooperation of different state courts to further the goal that a custody decree be rendered in the state which can best decide the case in the interest of the child. The UCCJA assures that litigation concerning the custody of the child takes place ordinarily in the state with which the child and its family have the closest connection and where significant evidence concerning the child's care, protection, training and personal relationships are most readily available, and "that the courts of this commonwealth decline the exercise of jurisdiction when the child and his family have a closer connection with another state." 23 Pa. C.S.A. § 5342(a)(1)-(3). More importantly, the UCCJA is intended to deter abductions and other unilateral removals of children undertaken to obtain custody awards, and to avoid the relitigation of custody decisions of other states, insofar as is feasible, along with facilitating the enforcement of custody decrees of other states. 23 Pa. C.S.A. § 5342(a)(5)-(7).

Petitioner challenges that Trial Court failed to review the record under § 5344 of the UCCJA, which provides for jurisdiction. Generally, § 5344 provides as follows:

> (A) A court of this commonwealth which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this commonwealth:

(i) is the home state of the child at the time of commencement of the proceeding; or

(ii) had been the home state of the child within six months before commencement of the proceeding and the child is absent from this commonwealth because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to lives in this commonwealth;

(2) It is in the best interest of the child that a court of this commonwealth assume jurisdiction because:

(i) the child and his parents, or the child and at least one contestant, have a significant connection with this commonwealth; and

(ii) there is available in this commonwealth substantial evidence concerning the present or future care, protection, training and personal relationships of the child;

(3) The child is physically present in this commonwealth, and:

(i) the child has been abandoned; or

(ii) it is necessary in an emergency to protect the child because he has been subject to or threatened with mistreatment or abuse, or is otherwise neglected or dependent;

(4) (i) it appears that no other state would have jurisdiction under the prerequisite substantially in accordance with paragraph (i), (ii) or (iii), or another state has declined to exercise jurisdiction on the ground that this commonwealth is the more appropriate forum to determine the custody of the child; and

(ii) it is in the best interest of the child that the court assume jurisdiction, or . . .

23 Pa. C.S.A. § 5344.

In this case, the record reflects that the Hague Court sitting in Australia reviewed the implementing regulations of the Hague Convention in Australia and, at Petitioner's urging, relied upon § 5344 of the UCCJA, along with an affidavit from Petitioner's Pennsylvania lawyer, Rodney Fisher, Esquire, in relation to the application of Pennsylvania law, when it made a determination on the record that Australia was the state of

habitual residence of the parties' child. In addition, the trial court reviewed an analogous decision applying the UCCJA, *Feder v. Evans-Feder*, in which the facts are remarkably similar. In that case, the family and their child lived in Pennsylvania but father's employment was terminated. Father began exploring job opportunities in Australia, and the family traveled to Australia to evaluate job opportunities. The evidence in that case was clear that the mother was not so inclined to move to Australia, but went along to work toward salvaging her marriage. The family purchased a home in Australia, arranged for the move, and their child attended school in Australia. The mother applied to have the child admitted to a private school for fifth grade seven years later. Both mother and father completed the necessary paperwork to obtain permanent residence for the family.

Shortly after the family moved into their new home in Australia, the couple's relationship did not improve and the mother deceived the father into making arrangements for her to take a short vacation visit to her family in Pennsylvania. Once in Pennsylvania, mother filed for custody of the child. Shortly thereafter, the father proceeded in Australia under the Hague Convention for the return of the child on the basis that the family were habitual residents of Australia, and the child had been wrongfully removed from its place of habitual residence.

The District Court held that the United States was the child's habitual residence. On appeal, the Third Circuit Court of Appeals reversed the District Court because the District Court placed undue emphasis on one parent's lack of intent to remain in Australia. The Third Circuit Panel determined that although the parents viewed their residence and commitment to Australia very differently, both had agreed to move to the country and live there with one another and their son, and

> did what parents intent on making a new home for themselves and their children do — they purchased

> and renovated a house, pursued interests and employment, and arranged for their child's immediate and long-term schooling. That Mrs. Feder did not intend to remain in Australia and permanently and believed that she would leave if her marriage did not prove does not void the couple's settled purpose to live as a family in the place where Mr. Feder had found work.

Feder at 224.

Similarly here, rather than accord any weight to Petitioner's independent thought processes and disagreement with Respondent about the future of their residence in Australia, the Hague Court properly focused on their actions evidencing the settled purpose to remain in that country. Husband's subjective intentions do not negate the validity of the findings of the Australian Family Court. The focus must be on the child and the conduct of the parents. Here, as in *Feder*, the child moved with his parents from Pennsylvania to Australia, where he was to live for at least the foreseeable future, and stayed in Australia for close to six months, "a significant period of time" for a child of his age. *Feder* at 224.

In reviewing the record evidence in this matter, the trial court determined that the parties did at least as much as the family in *Feder* to establish habitual residence for the child in Australia.

Respondent submits that the trial court was without jurisdiction and without authority to disregard the Hague Court determination of habitual residence, but rather, was required to defer to the findings of fact of the Australian Court on the issue of habitual residence. Moreover, as in *Feder*, the custody rights determined under the Australian Family Law are rights which the trial court may "take judicial notice without recourse to the specific procedures for the proof of that law." *Feder* at 225 (*quoting* Hague Convention Article XIV).

The trial court, although not required to do so, also stepped through the § 5344(A)(2) "best interests" analysis and correctly determined that the child had maximum significant connections with Australia and not the Commonwealth. The trial court correctly concluded that there is available in Australia substantial evidence concerning the present and future care, protection, training and physical relationships of the child, and not in Pennsylvania. (T.Ct.Op. at p. 7).

It appears that Petitioner is attempting to now use the Hague standard to narrow jurisdiction within the confines of the UCCJA. Specifically, evidence relevance to a Hague determination of wrongful removal is established at the point of the removal of the child. Any evidence of future conduct or relationships is irrelevant to the Hague determination. However, under the UCCJA this evidence is clearly important for the trial court's determination. As such, the trial court did not abuse its discretion in declining jurisdiction to the extent that jurisdiction could have been assumed by the trial court. The trial court identified that even if the home state of the child under the UCCJA was Pennsylvania, it is not always the most appropriate jurisdiction for the determination of the underlying custody matter. *Baines v. Williams*, 635 A.2d 1077 (Pa. Super. 1993). Accordingly, based on the application of § 5344 alone, the trial court correctly determined that Australia is the jurisdiction best suited to adjudicate the parties' child custody rights.

III. COMITY

Petitioner alleges that the Pennsylvania State Courts ignored jurisdictional notions of comity and the international application of the UCCJA set forth in 23 Pa. C.S.A. § 5365 by assuming that the Australian Custody Order was valid. Petitioner claims that the Australian Order and the initial Pennsylvania temporary Order are a nullity because the Australian Order was issued ex parte, the Petition which Respondent filed in Pennsylvania Court seeking to enforce the Australian Order was later withdrawn by

Petitioner, and finally the Pennsylvania Order granting temporary custody pending a hearing was later vacated by a subsequent Court Order in the Pennsylvania proceedings.

As was stated *supra*, the trial court specifically reviewed the evidence by applying § 5365 at the UCCJA (International Application) and concluded that the Australian Family Court custody decree on assumption of jurisdiction was properly recognized and deferred to by trial court. Respondent initiated the Australian Family Court action after Petition fled the country with the parties' child. While Respondent was seeking to enforce her custody rights under Australian law, Petitioner initiated the State Court custody action in the Court of Common Pleas of Berks County Pennsylvania and later filed a Hague Application to Australia to determine the jurisdictional issue. Following a voluminous evidentiary record and an exhaustion of appeals to the highest Court in Australia the jurisdiction for the underlying child custody dispute was established in Australia in accordance with Australian law. Therefore, even if the Pennsylvania Court determined it had jurisdiction over the underlying dispute, § 5365 of the UCCJA required the Pennsylvania Court to stay its hand and allow the Australian custody matter to proceed.

CONCLUSION

Based on the foregoing, Respondent asserts that most if not all of Petitioner's claims are barred either by lack of jurisdiction or by waiver and abandonment at the State Court level. Moreover, on substance, the record reflects that the PKPA simply does not have application to the facts of record in this case. The record evidence before the trial court more than adequately provided the trial court with the necessary basis to dismiss Petitioner's Pennsylvania custody action. The trial court correctly complied with applicable Federal and State law by recognizing the validity of the Australia custody decree, and, more importantly, after an independent review of the evidence, agreeing with the Hague Court's determination that jurisdiction

of the parties' underlying custody dispute properly rests with the Family Court of Australia. Petitioner's assertion of an intractable jurisdictional conflict, exists in perception only. Petitioner has been afforded more than due process.

Indeed, Petitioner has been afforded "quadruple" due process, on the issues of jurisdiction, by having four courts, two in Australia and two in the Commonwealth of Pennsylvania, review the evidence. Petitioner's continuation of the instant litigation is no more than protracted forum shopping which in inimicable to the intent and purpose of the Hague Convention, as applied by the International Child Abduction Remedies Act, and the Pennsylvania Uniform Child Custody Jurisdiction Act, all of which seek to deter the very conduct Petitioner engaged in when he unilaterally and unlawfully abducted the parties' child and fled Australia. Accordingly, Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — FAMILY COURT ORDER OF THE FAMILY COURT OF AUSTRALIA DATED APRIL 1, 1999

FAMILY LAW ACT 1975

IN THE FAMILY COURT OF AUSTRALIA

AT BRISBANE	No BR12272 of 1995
BETWEEN	PANAYOTIDES MICHAEL
	HUSBAND
AND	PANAYOTIDES JULIE
	WIFE

BEFORE THE HONOURABLE JUSTICE JORDAN
THE FIRST DAY OF APRIL 1999

UPON application made to the Court, Mr. Page, Senior Counsel, appearing on behalf of the Husband and Mr. Waterman of Counsel appearing on behalf of the Wife,

IT IS ORDERED:

1. That the proceedings commenced in this Court for settlement of property, spousal maintenance and child maintenance by applications filed on 13 January 1996 and 19 January 1996 be stayed.

Appendix A

2. That all property applications made in Forms 8 and 8A be dismissed and removed from the Pending Cases List.

3. That the application for residence and contact be adjourned to the Registrar for the [sic] of a fresh date for the pre-hearing conference adjourned on 19 September 1999.

4. That the application for Dissolution of Marriage filed on 21 November 1996 be adjourned for hearing before the Honourable Justice Jordan on 19 April 1999 at 9:55 a.m.

5. That in the proceedings for residence and contact, the husband file and serve a Notice of Address for Service together with a Response in Form 7A on or before 15 May 1999.

6. That the wife's solicitors forthwith send to the husband at his address at 1903 Trooper Road, Reading, Pennsylvania a sealed copy of this Order, together with any material upon which the wife intends to rely, which dispatch shall be deemed to be service of this Order upon him.

7. That the issue of this Order be expedited.

8. That the question of costs, including reserved costs, be adjourned to the trial of the proceedings for residence and contact.